IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

APPEAL NO.843 OF 2005
IN
NOTICE OF MOTION NO.2178 OF 2004
IN
SUIT NO.1777 OF 2004

1. Salma Aggarali Makati & ors. Appellants
vs.
1. Shabbir Shaikh Shamsuddin Pachorawala
& anr. Respondents

Mr.A.S.T.Zaidy with Ms.J.Sidhwa & Ms.Tasneem Zaidy i/b.M/s.Zaidy & Co. for the appellants.

Mrs.Shakuntala Joshi with Mr.S. Shamim i/b.M/s.Shamim & Co. for the respondents.

CORAM : R.M. LODHA &
D.G. KARNIK, JJ.

DATED : 15th December 2005

P.C.

Heard Mr.A.S.T.Zaidy, the learned counsel for the appellants and Mrs.Shakuntala Joshi, the learned counsel for the respondents. For the sake of convenience, we shall refer to the appellants as 'plaintiffs' and the respondents as 'defendant'.

2. The plaintiffs are in appeal aggrieved by the order dated 16th June 2005 to the extent the learned motion Judge appointed the defendant no.1 as an agent of Court Receiver in respect of the subject immovable properties without royalty and security.

3. The learned counsel for the defendants, at the outset, submitted that the order dated 16th June 2005 is a consent order and, therefore, the appeal is not maintainable.

4. Responding to the objection of the learned counsel for the defendants, the learned counsel for the plaintiffs submitted that the plaintiffs consented for appointment of Court Receiver of the immovable properties described in Exhibit "D" annexed with the plaint excluding the property bracketed at page 50 of the plaint but never consented that the defendant no.1 be appointed as an agent of the Court Receiver without royalty and security.

5. For proper consideration of this aspect, we reproduce the order dated 16th June 2005 as it is:

> "1. By consent of the plaintiff and the defendant no.1 the Court Receiver of this Court is appointed as the Receiver of the immoveable properties described in Exh. "D" excluding the property which is described in bracket at page 50 of the plaint.
>
> 2. The Receiver shall take only symbolic possession and appoint the Defendant No.1 as his agent to be in possession of these properties on usual terms and conditions except the condition of royalty and security. The Defendant No.1, however, shall maintain accounts of the income and expenditure in relation to the immoveable properties in relation to which he has been appointed as agent as also of the firm M/s.Raj Bucket Factory.

3. Till the Receiver takes possession and appoint the Defendant No.1 as agent of the Receiver, ad-interim order in terms of prayer clause (b) shall operate. Motion disposed of."

6. On a careful reading of the order dated 16th June 2005, it cannot be said that the plaintiffs consented to the appointment of defendant no.1 as an agent of the Court Receiver without royalty and security. The consent that was given by the plaintiffs and the defendant no.1 was that Receiver be appointed in respect of the immovable properties described in Exhibit "D" excluding the property bracketed on page 50 of the plaint. That the defendant no.1 has been appointed as an agent, as a matter of fact, is also not in challenge by the plaintiffs. The challenge is only to the extent of the appointment of defendant no.1 as an agent of the Court Receiver without royalty and security. To that extent the appeal cannot be said to be not maintainable as there is no consent given by the plaintiffs before the learned motion Judge that the defendant no.1 be appointed as an agent of the Court Receiver without royalty and security.

7. Shaikh Shamsuddin Esufali Pachorawala died on 6.4.2001 leaving behind his widow Sarabai, three sons, Bakir, Siddique and Shabbir and four daughters, Salma, Zareena, Farida and Samina. The widow Sarabai said to

have died prior to the filing of the Suit. The three sons are plaintiff no.2, defendant no.1 and defendant no.2. The four daughters are plaintiff no.1, plaintiff no.3, plaintiff no.4 and plaintiff no.5. The Suit is for the administration of the estate of deceased Shaikh Shamsuddin Esufali Pachoriwala.

8. Late Shaikh Shamsuddin Esufali Pachoriwala left behind huge immovable and movable properties as set out in Exhibit "D" to the plaint. Since the question in the appeal concerns the immovable properties in respect of which the Court Receiver has been appointed and the defendant no.1 has been appointed as an agent of the Court Receiver without royalty and security, we confine the consideration of the matter only to that respect. According to the plaintiffs, the parties are entitled to their share in the estate of the deceased as per Muslim Shariat Law. Some of the immovable properties are said to be in possession of the defendant no.1, some of these properties are said to be in occupation of the tenants and some of the immovable properties are lying vacant. In the memorandum of appeal, the plaintiffs have alleged: that in the residential bungalow of the deceased situate at Ghodbunder village, the first defendant has put Chaitanya Mental Health Care Centre of Poona as tenant and he has been receiving monthly rent @ Rs.1,00,000/- for the last two years; that the

industrial sheds have been let out by the first defendant to M/s.Okay Transport at a monthly rent of Rs.70,000/-; M/s.Bharat N. Patel at a monthly rent of Rs.21,000/- and M/s.Petrox Containers at a monthly rent of Rs.32,750/-. It is also alleged that the bungalow at Ghodbundar is mortgaged with the Union Bank of India and a sum of Rs.18,48,441 as on 1st May 2005 is due and payable to the Bank.

9. Though there is no written reply to the aforesaid facts by the defendant no.1 but during the course of hearing, the learned counsel for the defendants admitted that the industrial sheds have been let out by the defendant no.1 to different parties and a sum of Rs.50,000/- per month is received by the defendant no.1 from these tenants. However she submits that the amount so received is paid as it is to the Bank towards outstanding amount. As regards the bungalow in possession of Chaitanya Mental Health Care Centre of Poona, the learned counsel for the defendants stated that the said Chaitanya Mental Health Care Centre has been put in possession of bungalow at Ghodbundar village to keep one of the sisters occupied as she is schizophreniac; however, no rent is received by the defendant no.1 from Chaitanya Mental Health Care Centre of Poona.

10. The facts that have been noticed above lead us to hold that for all the immovable properties, the defendant no.1 could not have been appointed as an agent of the Court Receiver without royalty and security. Some of the immovable properties, as already noticed above, are not in actual physical possession of the defendant no.1 but are occupied by the third parties and tenants and monthly rent is received by the defendant no.1 from these tenants. There is also outstanding amount payable to Union Bank of India from the estate of the deceased.

11. In this view of the matter, we are satisfied that the impugned order dated 16th June 2005 deserves to be modified to the extent below:

(i) In respect of the immovable properties described in Exhibit "D" which are in tenancy or otherwise occupation of third parties, the Court Receiver shall have inspection of the said properties and direct the said tenants/occupants to pay the rent/monthly occupation charges to the Court Receiver directly.

(ii) The rent/monthly occupation charges so received from the tenants/occupants by the

Court Receiver shall be paid by the Court Receiver to the Union Bank of India towards the amount due and payable from the estate of the deceased Shaikh Shamsuddin Esufali Pachoriwala.

. It is clarified that the defendant no.1 shall continue to be an agent of the Court Receiver in respect of the immovable properties which are in his actual physical possession or lying vacant. Such agency to the defendant no.1 shall be on usual terms and conditions but as directed by the learned motion Judge without royalty and security.

12. With the aforesaid modification, the impugned order dated 16th June 2005 is maintained.

(R.M.LODHA, J.)

(D. G. KARNIK, J.)